93-565

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SHARON WILLIAMS,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENT A. SCHAFFER
Counsel of Record
600 Travis, #3000
Houston, TX 77002
(713)228-8500

STEVEN J. LIEBERMAN
600 Travis, #3000
Houston, TX 77002
(713)228-8500

QUESTION PRESENTED

I. Whether the Fifth Circuit Court of Appeals failure to distinguish a "buyer-seller" drug relationship from that of a conspiratorial relationship is in conflict with other Federal Circuit Courts of Appeals, and therefore denied the Petitioner due process of law.

LIST OF PARTIES IN APPELLATE COURT

Sharon Williams,

Appellant,

United States of America,

Appellee

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REFERENCE TO OPINIONS OF LOWER COURT

The opinion of the Fifth Circuit Court of Appeals is reproduced in the appendix.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case, pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. The panel's order was entered on July 13, 1993. See A-3. Consistent with this Honorable Court's Rule 13, this Petition is timely filed. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254(1), and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS AT ISSUE

1. The Due Process Clause of the Fifth Amendment to the United States Constitution states:

> "[N]or shall any person be deprived of . . . liberty . . . without due process of law."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States District Court for the Northern District of Texas, Amarillo Division. References herein shall be made to the trial record, by the designation "R".

On June 4, 1991, the Petitioner was indicted by a federal grand jury, charging her with one count of conspiracy to distribute and possess with intent to distribute cocaine and cocaine base; and with two counts of distribution and possession with intent to distribute cocaine.

In 1987, Samuel Cleon Scott, Jr. returned to Amarillo, Texas, from California and began to deal cocaine. (2 R.908). The first cocaine that he sold he brought with him from California, and sold

it in two to three weeks. (2 R.923). Scott continued to acquire cocaine for further distribution, both locally and from people in California who were passing through town. (2 R.924). In the summer of 1989, Scott started to buy cocaine from Gloria Reed. (2 R.971). Gloria Reed would front the cocaine to Scott, which he believed was ultimately coming from Doris Davis. (2 R.973).

Eventually Scott and Reed began to buy cocaine together in larger quantities. (2 R.974). On one occasion they travelled to California to purchase a kilo of cocaine. Id. They went to California first, and Scott later flew to Los Angeles to meet her. (2 R.977). After encountering some difficulty in locating some cocaine, Scott flew back to Amarillo. (2 R.978). A couple of days later he received a phone call from Reed who said

she was back in Amarillo with the drugs. (2 R.279). Scott went to meet Reed at T.J. Sneed's house where he saw a kilo and a half of powder cocaine. (2 R.980). After converting the powder into crack cocaine, Scott sold two-thirds of it and Reed sold the rest. (2 R.1003-1004).

On November 14, 1989, Scott and Reed made a trip to Houston for the purpose of purchasing a kilo of cocaine. Id. According to Scott, Reed had a connection in Houston. (2 R.1005). On the way to Houston, they stopped in Huntsville, Texas, where Scott overheard a phone call made by Reed who was calling a lady named Sharon. (2 R.1006). Reed told Scott that Sharon was in Houston. (2 R.1007).

After arriving in Houston, Reed and Scott checked into a motel where they stayed in the same room. Id. The next morning they called Sharon, who came to

their room. (2 R.1008). Upon Sharon's arrival at the room, they counted the money to make sure all the money was there. Id. Scott identified the lady he knew as Sharon to be the defendant Sharon Williams. (2 R.1009).

Scott and Reed had brought with them $24,500.00 in cash in anticipation of purchasing a kilo of cocaine. Half the money was Scott's and the other half was Gloria Reed's. Id. After shopping in the mall, Scott followed Reed and Sharon to a house. (2 R.1012). Prior to going to the house, Reed had told Scott they were going to pick up the dope. (2 R.1013). After arriving at the house, Gloria Reed and Sharon went into the house, while Scott waited outside in the car. (2 R.1012-1013). They stayed in the house two to three minutes, came out and got in Sharon's car, and he followed them to a

seafood restaurant. (2 R.1014). While at the restaurant, Reed showed Scott the cocaine which she was carrying in her purse. Id.

On November 22, 1989, Scott and Reed made another trip to Houston to get more cocaine. (2 R.1016). They planned the trip the previous day, with Gloria Reed making a phone call to set up the deal. (2 R.1017). Scott heard Reed calling Houston and talking to Sharon. Id. They drove straight through to Houston, checked into a La Quinta Inn motel, and called Sharon. (2 R.1018). Sharon came over and they counted the money, which was a $1,000.00 short. (2 R.1019). Scott and Reed were going to purchase a kilo for themselves, and another kilo for someone called "Little Man". Id. Scott, Reed and Sharon left the motel and proceeded to an office building in downtown Houston. (2

R.1020). They went into the office and put the money on a desk and counted it. Id. Reed told Scott that it would be okay for her to owe Sharon the $1,000.00 they were short. (2 R.1021). Sharon and a "guy" who was at the office took the money. Id.

Scott went to his car and waited, while Sharon, Gloria Reed, and the "guy" in the office left in Sharon's car. (2 R.1022). They returned fifteen to twenty minutes later, and Gloria got into the car with Scott and showed him the dope, which appeared to be two kilos. Id.

Scott further testified that on December 23, 1989, Gloria and a lady named Anita travelled to Houston. (2 R.1028). Scott spoke with Gloria prior to the trip and determined that she intended to purchase a kilo of cocaine. (2 R.1029). However, she did not purchase a kilo

because the price had gone up from $24,500.00 to $30,000.00 a kilo. Id. After Scott spoke by phone with Reed in Houston, and they decided to buy a quarter of a kilo. (2 R.1030). Out of this quarter, Scott received five ounces which Reed had cooked into crack. (2 R.103). Scott testified that Reed indicated she had gotten the cocaine from Sharon. Id.

On January 17, 1990, Scott and Reed again travelled to Houston in order to buy a kilo. (2 R.1033). Gloria had called Sharon and it was agreed that the price would be $24,500.00. (2 R.1034). After they arrived in Houston, Reed called Sharon and found out it would take a couple of days to get the cocaine, so Scott flew back to Amarillo. (2 R.1034). Scott saw Reed two to three days later at T.J.'s house in Amarillo. (2 R.1036). At T.J.'s house they went through the same

process of breaking down the kilo of cocaine. Id.

On February 13, 1990, Gloria Reed made a trip to California. (2 R.1037). This trip to California was predicated on the conversations Reed and Sharon had two days prior to the trip. (2 R.1038). Reed had called Sharon from Scott's mother's liquor store, and he overheard the conversation. The price negotiated between Reed and Sharon was too high, so Reed went to California. Id. Following Reed's trip to California, she returned with a kilo of cocaine. (2 R.1039-1040).

In March of 1990, Gloria Reed went to Houston to purchase a quarter kilo with $7,500.00 that Scott had sent with her. (2 R.1041). Reed was gone three to four days, and when she returned she came to Scott's house on 12th Street and showed him the cocaine. Id. This trip marked

the last transaction between Sammy Scott and Gloria Reed. (2 R.1042).

ARGUMENT

I.

THE EXISTENCE OF SELLER-BUYER RELATIONSHIP DOES NOT ESTABLISH KNOWING AND INTENTIONAL PARTICIPATION IN A DRUG CONSPIRACY

It is axiomatic that to prove one was a member of a conspiracy, the government must present sufficient evidence to demonstrate that the person knew of the conspiracy and intended to join and associate himself with its criminal design and purposes. It is clear that proof of the existence of a mere buyer-seller relationship without more is inadequate to tie the buyer [or seller] to a larger conspiracy. United States v. Onick, 889 F.2d 1425 (5th Cir. 1989); United States v. Townsend, 924 F.2d 1385 (7th Cir. 1991).

The evidence clearly shows that two persons, Sammy Scott and Gloria Reed, were

members of a drug conspiracy in the Amarillo, Texas area. Furthermore, the evidence established that these two individuals had to travel outside of Amarillo, Texas to obtain cocaine. One of the locations where cocaine was obtained was from Houston, Texas. The evidence simply established that on a few separate occasions cocaine was purchased from the Petitioner, who lived in Houston, Texas.

Various circuit courts of appeals have held that merely purchasing drugs or other property from a conspiracy, standing alone, can never establish membership in a conspiracy. Id.; United States v. McIntyre, 836 F.2d 467 (10th Cir. 1987); United States v. Grunsfeld, 558 F.2d 1231 (6th Cir. 1977), cert. denied, 434 U.S. 872 (1977); United States v. Torres, 503 F.2d 1120 (2nd Cir. 1975); United States v. Kapp, 781 F.2d 1008 (3rd Cir.), cert.

denied, 475 U.S. 1024 (1986). For the reasons stated below the Fifth Circuit panel's decision is in conflict with other federal circuit courts of appeals. See U.S. Supreme Court Rule 10.1(a)

The Seventh Circuit Court of Appeals in United States v. Townsend, supra, thoroughly addressed the distinction between a buy-sell agreement and a conspiracy. In Townsend, the Court noted that a buy-sell transaction is simply not probative of an agreement to join together to accomplish a criminal objective beyond that already being accomplished by the transaction. A sale, by definition, requires two parties; their combination for that limited purpose does not increase the likelihood that the sale will take place, so conspiracy liability would be inappropriate. 924 F.2d at 1394.

The Seventh Circuit has additionally

held:

> *"[t]he relationship of buyer and seller (absent any prior or contemporaneous understanding beyond the mere sales agreement) does not prove a conspiracy . . . In such circumstances, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective."*

United States v. Kimmons, 917 F.2d 1011 (7th Cir. 1990), reiterating United States v. Ford, 324 F.2d 950 (7th Cir. 1963).

The mere purchase or sale of drugs (even in large quantities) does not demonstrate an agreement to join a drug distribution conspiracy "any more than a purchase of 100 tons of steel to build a skyscraper shows that the buyer has 'joined' the corporate enterprise of the manufacturer." Townsend, 924 F.2d at 1394, citing United States v. Baker, 905 F.2d 1100 (7th Cir.), cert. denied, 111 S.Ct. 206 (1990).

The evidence in the instant case reflects that Reed and Scott had several

sources of cocaine, and after negotiation would purchase cocaine from the source offering the best price. Evidence that the parties must negotiate the terms of every transaction, seek to maximize their gains at the expense of others, or engage in other forms of opportunistic behavior at the expense of the group, suggests that transaction costs among the group are high and counsel against a finding of conspiracy between its members. Townsend, 924 F.2d at 1395.

In United States v. McIntyre, supra, the Tenth Circuit Court of Appeals has similarly commented on the difference between a buyer-seller relationship and a conspiracy.- The Fifth Circuit, in the instant case, rendered an opinion in conflict with the Tenth Circuit's findings.

In McIntyre, the Court noted that a

common goal must exist between all parties involved in order to transform a buyer-seller relationship into a conspiracy. To satisfy this common goal, "the essential element of interdependence must be met - each alleged co-conspirator must depend on the successful operation of each 'link' in the chain to achieve the common goal." 836 F.2d at 471.

The McIntyre Court concluded that the government had not shown that if the buyer had failed to possess and distribute drugs on any one of the named occasions, the failure would have had any effect on the success of the other transactions. 836 F.2d at 422. This finding is critical in light of the separate transactions outlined in the instant case. Absolutely no evidence was introduced to prove that had Reed failed to obtain cocaine from Petitioner, the joint effort between Reed

and Scott would have ended.

Due process protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358 (1970). Due process requires that the reasonable doubt standard be indispensable for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue", and it operates to give "concrete substance" to the presumption of innocence to ensure against unjust conviction. Id.

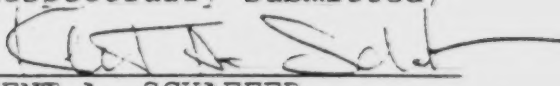
On review of the sufficiency of the evidence, the panel erroneously affirmed the conviction for conspiracy to distribute and possess with intent to distribute cocaine, where at most it was proven that Petitioner sold cocaine to a

member of a conspiracy. As has been previously shown, the Fifth Circuit has rendered a decision in conflict with those federal circuit courts of appeal cited above.

CONCLUSION

For the foregoing reason, the Petitioner respectfully submits that a compelling basis exists for this Honorable Court to grant this Petition for Writ of Certiorari, and accordingly reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,



KENT A. SCHAFFER
600 Travis, Suite 3000
Houston, Texas 77002
(713)228-8500

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that an original and forty (40) copies of the foregoing Petition for Writ of Certiorari and its Appendix were mailed by the undersigned to the United States Supreme Court on the 5th day of October, 1993. I also certify that true copies of the foregoing Petition of Writ of Certiorari were mailed to the following parties, via United States mail:

Delonia A. Watson
Assistant U.S. Attorney
Northern District of Texas
1100 Commerce St.
Room 16G28
Dallas, TX 75242
[One copy]

Solicitor General
Dept. of Justice
10th St. &
Constitution Ave.
Washington, D.C.
20530
[Three copies]

Sharon Williams
[One copy]

KENT A. SCHAFFER

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KENT A. SCHAFFER
Counsel of Record
600 Travis, #3000
Houston, TX 77002
(713)228-8500

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600 Travis, #3000
Houston, TX 77002
(713)228-8500

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1260

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT LYNN CASEL, a/k/a "POLO"
BENNIE JAY JACKSON,
GLORIA REED, a/k/a LULA MAE REED,
HERBERT D. JOHNSON, JR. and
SHARON WILLIAMS,

Defendant-Appellant.

Appeal from the United States
District Court for the
Northern District of Texas

Before GOLDBERG, GARWOOD and WIENER, Circuit Judges.

GOLDBERG, Circuit Judge:

This appeal arises in the aftermath of a month-long trial involving eight

defendants charged with twenty-nine counts of drug-related offenses. Five of the eight defendants appeal their convictions, raising myriad issues. Although we have considered all of the contested issues, we find that only five merit discussion. Finding no error, we affirm the convictions and sentences of the appealing defendants. We dismiss appellants' claims of ineffective assistance of counsel, without prejudice to those claims later being raised in a habeas corpus proceeding.

FACTS

All five appellants were convicted of possession and distribution of cocaine. Only Reed and Williams were convicted of conspiracy. Williams allegedly was the supplier of the cocaine, selling it to Reed who, with the help of the other appellants, resold it. The government

presented documentary evidence and nine witnesses to support its case against appellants. the government relied most heavily on the testimony of a man named Sammy Scott, Jr. ("Scott"), a member to the drug ring who received a lenient plea agreement in exchange for his testimony. Scott's testimony was internally inconsistent and, it now appears, inaccurate in certain respects, though not necessarily mendacious. Scott's testimony was the sole evidence used to convict Casel on count twenty-eight (distribution of cocaine), and Reed on count four (sale of cocaine to a minor). We will address the facts pertaining to each individual appellant in turn, beginning with appellant Williams.

Scott testified that Williams was one of the primary suppliers of the drug ring, selling Reed between one-quarter kilogram

and two kilograms of the drug on four occasions. Scott testified that on one or two occasions, he did not actually see Williams in possession of the cocaine Reed allegedly obtained from Williams. However, Scott testified that on other occasions (including one occasion when two kilograms were obtained by Reed), Williams made a point of showing Scott the cocaine. Scott also testified that Williams was aware of the drug ring's operations.

Scott testified that during his involvement with Reed, the leader of the drug ring, he bought cocaine from Reed, saw Reed cooking and refining cocaine, helped Reed sell cocaine to adults and to at least one minor, shared the profits from their cocaine sales, and traveled with Reed to destinations at which Reed obtained cocaine from suppliers like Williams.

Scott testified that Reed went to California to buy a kilogram of cocaine for defendant Johnson, and that when she returned she announced her intention to sell it to Johnson. Later she gave Scott $2,000 as his share of the sale. This transaction formed the basis for count seven. Scott's mother corroborated Scott's testimony that when Reed arrived back in Amarillo from her trip to California, Reed stated she had a kilogram of cocaine in her girdle. The government also introduced documentary evidence showing that Reed had made a trip to California on or around the date which Scott and his mother claimed she had. There was additional evidence that Reed had participated in a "controlled buy."

Scott testified that he was present when Reed and Johnson negotiated the sale of five ounces of cocaine to a minor.

Scott watched Reed, Johnson and the minor got to Johnson's home. When Reed returned, Reed told Scott she had just taken care of some business and gave him $2,500, which he presumed was his share of the sale. This sale formed the basis of court four of the indictment.

The government introduced documentary evidence establishing that telephone calls were made to Scott's mother to appellant Williams from pay phones near the hotel at which scott claimed that he and Reed stayed during one of their trips to Houston to buy drugs from Williams. Scott's mother corroborated his testimony when she stated that she had personal knowledge of the fact that her son and Reed were involved in drug dealing. Other witnesses testified that Reed had sold cocaine to them or to people they knew. Still others testified that Reed had

borrowed money from them in order to purchase cocaine from her sources.

Scott agreed to cooperate with the government prior to the time at which Reed was indicted. During this period, some of Scott's conversations with Reed were audiotaped, including some in which Reed discussed the drug ring's operations and her ability to recognize cocaine of various qualities. These audiotapes were later played for the jury.

Scott also testified against Johnson. As noted above, Scott testified that Johnson assisted Reed in the sale of cocaine to a minor, and on at least one occasion delivered cocaine to Scott's mother's store. The government introduced evidence of many purchases and sales of cocaine by Johnson during the period 1986-

90,[1] evidence of Johnson's state court conviction for possession of cocaine in 1987, and cocaine seized from johnson's home with a search warrant.

Several witnesses testified to Jackson's role in buying and selling drugs for the drug ring. Evidence was produced to show that Jackson had sold cocaine to an undercover government agent. A witness named Teresa Watts testified that she sold cocaine for Jackson. Watts claimed that Jackson tried to cajole (if not coerce) her into testifying that she did not sell drugs for him. While she admitted Jackson did not harm her or explicitly threaten her physically, she testified that he doggedly pursued her to various places she

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[1] Three witnesses, Gilbert Salinas, Homer Perkins and Mrs. Scott (Sammy Scott, Jr.'s mother) testified that they had all bought cocaine from Johnson during the period 1986-90.

frequented in order to encourage her to lie to the police.

Scott claimed that Casel sold cocaine to a group of five people in January, 1991. Then he changed his story and said the date of the sale was January, 1990. Scott named the five alleged buyers; when two of the alleged buyers were called as defense witnesses, they denied purchasing cocaire from Casel. the other three alleged buyers were not called as witnesses by either the government or the defense. It was later discovered that one of these alleged buyers had been incarcerated at the time of the alleged sale. Additional testimony regarding Casel's involvement in the drug ring included two witnesses' testimony that they had purchased cocaine from Casel on numerous occasions, and Mrs. Scott's testimony that one of the cocaine orders

she placed with Johnson was actually filled by Casel, who brought the cocaine to the liquor store operated by Mrs. Scott.

After a month-long jury trial, Casel was acquitted of one count of conspiracy, but was found guilty of one count of distribution of cocaine. Johnson was acquitted on one count of conspiracy, and found guilty on two counts of possession of cocaine with intent to distribute, two counts of distribution of cocaine (including one count for distribution of cocaine to a minor), one count of continuing criminal enterprise (drug trafficking), and five counts of money laundering. Jackson was acquitted on one count of conspiracy and one count of using a firearm during the drug trafficking crime, but was found guilty of three counts involving distribution of cocaine,

one count of continuing criminal enterprise (drug trafficking), and one count involving obstruction of justice. Reed was acquitted on one count of distribution of cocaine and another count of possession of cocaine with intent to distribute, but was found guilty of one count of conspiracy to distribute and conspiracy to possess cocaine with intent to distribute, one count of distribution of cocaine to a minor, one count of distribution of cocaine (to an adult), and four counts of distribution and possession of cocaine with intent to distribute. Williams was convicted on one count of conspiracy and two counts of distribution and possession with intent to distribute cocaine.

ANALYSIS

1. Whether the evidence was sufficient to support the convictions of Casel, Reed, Williams and Jackson?

An appellate court reviews the evidence if possible in a manner consistent with the verdict. Glasser v. United States, 315 U.S. 60, 80 (1942) ("The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it") (citations omitted); United States v. Fortna, 796 F.2d 724, 740 (5th Cir.) ("[W]e must examine all the evidence and reasonable inferences in the light most favorable to the government and determine whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt") (citations omitted), cert. denied, 479 U.S. 950 (1986); United States v. Bell, 678 F.2d 547, 549 (5th Cir.) ("It is not necessary that the evidence exclude every reasonable

hypothesis of innocence or be wholly inconsistent with every conclusion except guilt....A jury is free to choose among reasonable constructions of the evidence"), aff'd, 462 U.S. 356 (1983). The appellate court's role does not extend to weighing the evidence or assessing the credibility of witnesses. Bell, 678 F.2d at 549; United States v. Martin, 790 F.2d 1215, 1219 (5th Cir.), cert. denied, 479 U.S. 868 (1986); United States v. Varca, 896 F.2d 900, 905 (5th Cir.), cert. denied, 498 U.s. 878 (1990); United States v. Espinoza-Franco, 668 F.2d 848, 851 (5th Cir. 1982). If a rational trier of fact could have found the defendant guilty beyond a reasonable doubt of the essential elements of the offense, then the conviction must be upheld. Jackson v. Virginia, 443 U.S. 307 (1979) (habeas review of state court conviction); United

States v. Straach, 987 F.2d 232,237 (5th Cir. 1993). A review of the evidence against Casel, Reed, Williams and Jackson reveals that it was sufficient to support their convictions.[2]

CASEL:

Casel was convicted of selling cocaine (and of no other offense) solely on the basis of Scott's testimony. A conviction may be based solely on the uncorroborated testimony of an accomplice, as long as the testimony is not insubstantial on its face. See, e.g., United States v. Carrasco, 830 F.2d 41, 44 (5th Cir. 1987). However, Casel argues (along with his co-defendants) that Scott's testimony was not credible because he changed his story at least three times

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[2] Defendant Johnson does not contend that the evidence was insufficient to support his conviction.

during the trial.[3] Although it appears that Scott's testimony was indeed inaccurate in certain respects, it was not so inaccurate or inconsistent as to make it incredible as a matter of law.

Scott testified that on January 3, 1990, he witnessed Casel selling cocaine to a group of five people, including one person who was incarcerated on that date. Casel's trial attorney did not object to the testimony or attempt to present evidence that the buyer was incarcerated on January 3, 1990, because he did not learn about that fact until after the trial was concluded (but before sentencing

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[3] In addition to Scott's clearly having been wrong about the presence of the incarcerated buyer during the drug deal, there is also the fact that Scott originally stated that the transaction took place in January, 1991 (not January 1990), and that Scott initially stated that Casel had sold cocaine to a group of two people, not a group of five people.

had taken place).

The indictment's language ("on or about January 3, 1990") saves the indictment from having to be perfectly specific about the date in question. See United States v. Hernandez, 962 F.2d 1152, 1157 (5th Cir. 1992). Furthermore, Scott's testimony is not "incredible" merely because he misremembered the exact date of the transaction, or the number and identity of the buyers. The jury could have found that Scott inaccurately remembered the identity of one of the five buyers, while believing Scott's testimony that the sale of cocaine to a group of people by Casel occurred. Alternatively, it is possible that the jury decided that Scott misremembered the exact date of the transaction (because he expressed some uncertainty about it), but correctly remembered the identity of all five

purchasers. (The alleged buyer who was incarcerated on january 3, 1990, was a free man only a week before that date.[4]) The jury could have chosen to disbelieve the testimony of two of the alleged purchasers, who when called as witnesses for the defense claimed they had never purchased cocaine from Casel.

The test for "incredibility" of a witness is an extremely stringent one, because an appellate court does not weigh the credibility of witnesses. To be found "incredible" as a matter of law, the witness' testimony must be factually impossible. See United States v. Lindell, 881 F.2d 1313, 1322 (5th Cir. 1989) (Because the jury is "the ultimate arbiter of the credibility of a witness....Only

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[4] The alleged buyer was incarcerated from December 28, 1989 until sometime in March, 1990.

when testimony is so unbelievable on its fact that it defies physical laws should the court intervene and declare it incredible as a matter of law"), cert. denied, 496 U.S. 926 (1990); United States v. Silva, 748 F.2d 262, 266 (5th Cir. 1984) ("[A] conviction may be based solely upon the uncorroborated testimony of an accomplice if the testimony is not incredible or otherwise insubstantial on its face") (citation omitted). the mere fact that the witness' memory is later shown to be somewhat flawed will not suffice to demonstrate that the witness' entire testimony is "incredible."

In Lindell, this court was confronted with a claim that defendant's conviction for possession with intent to distribute marijuana was reversible because it was based upon the testimony of a witness who initially failed to mention the

defendant's role in the crime and only did so after further questioning by the prosecutor. The witness' implication of the defendant only after continued questioning by the prosecutor did not make the witness' testimony "unbelievable," 881 F.2d at 1322, for "[o]nly when testimony is so unbelievable on its face that it defies physical laws should the court intervene and declare it incredible as a matter of law." Id. (citing United States v. Carrasco, 830 f.2d 41, 44 (5th Cir. 1987); United States v. Palacios, 612 F.2d 972, 973 (5th Cir. 1980)). See also United States v. Espinoza-Franco, 668 F.2d 848, 851 (5th Cir. 1982). Under this standard, we are forced to conclude that Scott's testimony wa sufficiently credible that a jury could choose to rely upon it.

REED:

Reed was convicted on one count of

conspiracy, one count of distribution of cocaine to a minor, and three counts of distribution and possession of cocaine with intent to distribute. The government's case against Reed for distributing cocaine to a minor was supported solely by Scott's testimony. Scott testified that he saw Johnson and Reed negotiate a sale to a minor, and that he was al of them go to Johnson's house. When Reed returned, she allegedly said she had just taken care of some business and gave Scott $2,500, which Scott said he presumed was his share of the sale that had just occurred. As a co-defendant, Johnson could not be called to testify. The minor testified that he had never met Reed. Reed claims that Scott changed his testimony repeatedly and therefore was not a credible witness on whose testimony a reasonable jury could convict her.

However, we conclude that a reasonable jury could have disbelieved the minor and credited Scott's testimony, which was not "so unbelievable on its face that it def[ied] physical laws." Lindell, 881 F.2d at 1322.

The evidence supporting Reed's convictions for possession with intent to distribute one kilogram of cocaine, and sale of one kilogram of cocaine, is also sufficient. Scott testified that Reed went to California to purchase a kilogram of cocaine for resale in Amarillo. When Reed returned, she came to the liquor store operated by Mrs. Scott (Sammy Scott's mother). Mrs. Scott testified that Reed said she had just returned from California with a kilogram of cocaine in her girdle. The government also introduced documentary evidence and testimony of additional witnesses to

support its contention that Reed was the leader of a drug ring, purchased cocaine and processed it for resale, and sold cocaine on many occasions.

WILLIAMS:

Williams was convicted of one count of conspiracy and two counts of distribution and possession with intent to distribute cocaine. We find that there was sufficient evidence on which the jury could have based convictions on all three counts.

The evidence supporting Williams' conviction for distribution of cocaine includes Scott's testimony that he and Reed travelled to Houston on four separate occasions to purchase (from Williams) between one-quarter kilogram and two kilograms of cocaine. Scott claims that Williams showed him the cocaine on two of these occasions; the other two times, Reed

showed him the cocaine after meeting with Williams. The government also introduced certain documentary evidence of the connection between Reed and Williams: telephone records indicating calls from Reed to Williams on the dates, and from the locations, that Scott claimed the calls were made.

Williams claims that the evidence supporting the conviction for conspiracy is insufficient, because even if the evidence reveals that she sold cocaine to Reed, it does not show that she knew about or assisted in the business of the drug ring led by Reed. The evidence presented by the government indicates otherwise. Williams was Reed's primary supplier, repeatedly selling Reed quantities of cocaine so large that they could not possibly have been intended for personal use. While the amount of drugs bought or

sold does not by itself suffice to establish participation in a conspiracy, see United States v. Baker, 905 F.2d 1100, 1106 (7th Cir.), cert. denied, 498 U.S. 876 (1990), evidence "that the defendant knew of the existence and scope of the conspiracy and sought to promote its success," is sufficient. Id. Scott testified that Williams sold Reed lard amounts of powder cocaine on four occasions (at least once on partial credit), and was aware of Reed's intention to process and sell it.

Williams contends that the only member of the drug ring with whom she was acquainted was Reed, and that therefore she simply had a buyer-seller relationship to Reed. While "it takes two to conspire...the government doesn't have to prove with whom a defendant conspired; it need only prove that the defendant joined

the agreement alleged; not the group." United States v. Townsend, 924 F.2d 1385, 1389 (7th Cir. 1991). See also United States v. Michelena-Orovia, 719 F.2d 738, 746 (5th Cir. 1983) (en banc) ("Conspiracies to distribute narcotics have generally been considered to be prime examples of chain, or interconnected, conspiracies, in which a participant in a segment of the conspiracy may be convicted of participating in the whole"), cert. denied, 465 U.S. 1104 (1984); United States v. Martino, 664 F.2d 860, 876 (2d Cir. 1981), ("[I]n many narcotics distribution networks the ultimate retailers may not know the identities of those who supply their wholesaler, and the retailers' identities may be unknown to those suppliers; but all are well aware that they are participating in a collective venture"), cert. denied, Miller

v. United States, 458 U.S. 1110 (1982).

While it is true that "evidence of a buyer-seller relationship, standing alone, is insufficient to support a conspiracy conviction," Townsend, 924 F.2d at 1394, evidence indicating that both parties know that the drug purchases were meant to resale is "sufficient to establish a distribution conspiracy between time," Id. at 1415, especially when each party has a stake in the success of the other's business, suggesting "a substantial degree of cooperation and partnership rather than a series of isolated and sporadic transactions," Id. at 1406. It is especially significant that not only did each party know that "the other had a network of drug associates, but also...each was committed to maintaining their successful business relationship." Id. at 1406. Williams was Reed's primary

supplier. On at least one occasion, Williams sold Reed cocaine on partial credit, with the understanding that Reed would make up the amount owing at a later date, possibly at the time of the next purchase. Presumably, therefore, Williams considered it to be in her own long-term interests to cooperate with Reed and to help Reed succeed in reselling the cocaine Williams supplied her.

There was evidence that Reed's distribution of powder and crack cocaine was reasonably foreseeable to Williams, that Williams agreed to further Reed's criminal enterprise, and in fact assisted it. See United States v. Elam, 678 F.2d 1234 (5th Cir. 1982); United States vs. Devine, 934 F.2d 1325 (5th Cir. 1991), cert. denied, Barker v. United States, 112 S.Ct. 349 (1991). The jury was entitled to credit Scott's testimony and the

government's documentary evidence in convicting Williams on all three counts charged in the indictment.

JACKSON:

Defendant Jackson was convicted of obstructing justice in violation of 18 U.S.c. § 1503, based upon his having attempted to influence a witness using intimidation, threats and deception. He contends that his conviction under § 1503 was not supported by the evidence because no judicial proceeding had yet taken place at the time he attempted to influence the witness. While it is true that § 1503 can only support a conviction for interference with a pending judicial proceeding, as opposed to a police or agency investigation,[5] at the time Jackson

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[5] See United States v. Brown, 688 F.2d 596 (9th Cir. 1982); United States v. Woods, 958 F.2d 963 (10th Cir. 1992).

approached the witness and endeavored to intimidate her into lying for him, the superseding indictment had already been returned. Since this clearly indicates that a judicial proceeding was "pending," Jackson's conviction under § 1503 was not legally or factually insufficient.

2. Whether it was an abuse of discretion for the court to deny Casel's motion for a new trial based on newly discovered evidence?

An appellate court reviews the denial of a new trial based on the alleged existence of new evidence for abuse of discretion. United States v. Miliet, 804 F.2d 853 (5th Cir. 1986). In Miliet, this court laid out five elements, each of which must be present to justify a finding that the trial court's ruling was "so clearly erroneous as to amount to an abuse of discretion":

> (1) the evidence must be discovered following trial, (2)

> the movant must show due diligence to discover the evidence, (3) the evidence must not be merely cumulative or impeaching, (4) the evidence must be material to the issues before the court, and (5) the evidence must be of such a nature that a new trial would probably produce a new result.

804 F.2d at 859 (citing United States v. Fowler, 735 f.2d 823, 830 (5th cir. 1984)). Casel has not met this test.

Prior to sentencing, Casel's attorney submitted an affidavit to the court containing the "newly discovered evidence" that one of the five alleged buyers of cocaine had been incarcerated on the date Scott alleged the sale took place. Not only has Casel failed to establish "due diligence" in attempting to locate this "new" evidence, but he failed to show that a new trial would probably produce a new result. Moreover, because Casel had introduced the testimony of two of the

five alleged buyers, and these two persons had denied purchasing cocaine from him, the new evidence would be "merely cumulative or impeaching" under Miliet.

3. Whether Casel and Jackson were denied effective assistance of counsel?

Casel claims that this trial attorney gave him ineffective assistance by failing to investigate the whereabouts of the man who was incarcerated at the time that Casel is alleged to have sold him cocaine, and as a result of being the law partner of the spouse of one of the prosecutors in this case. Jackson claims his counsel gave him ineffective assistance by failing to challenge the jury venire prior to voir dire (for alleged underrepresentation of Hispanics), and by failing to introduce the testimony of certain witnesses who allegedly might have impeached Scott. Jackson also claims he received

ineffective assistance of counsel because his attorney failed to introduce character evidence at the sentencing phase.

None of these claimed deficiencies were brought to the attention of the district court prior to being argued on appeal. Generally, "a claim for ineffective assistance of counsel cannot be resolved on direct appeal unless it has been first raised before the district court." United States v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991). Exceptions to this general rule are made "only when the record has provided substantial details about the attorney's conduct." Id. See also United States v. Blankenship, 923 F.2d 1110, 1118 (5th Cir. 1991), cert. denied, 111 S.Ct. 2262 (1991). We decline to consider the issue of ineffective assistance of counsel because we consider the record insufficient. We dismiss this

portion of the appellants' appeals without prejudice to appellants' right to raise the issue of ineffective assistance of counsel in a habeas corpus proceeding. See Bounds, 943 F.2d at 543; United States v. Ugalde, 861 F.2d 802, 804 (5th Cir. 1988), cert. denied, 490 U.S. 1097 (1989); 28 U.S.C. § 2255 (1988).

4. Whether the court erred in conducted a James hearing in the presence of the jury?

A James hearing is held to determine whether an out-of-court statement of an alleged co-conspirator should be admitted into evidence. To admit an out-of-court statement of an alleged co-conspirator requires a showing of a conspiracy and of the connection of the declarant and the defendant with the conspiracy, as well as a showing that the statement was made during the course of the conspiracy and in furtherance of the conspiracy. United

States v. James, 590 F.2d 575 (5th Cir. 1979), cert. denied, 442 U.S. 917 (1979). The government is correct in stating that there is no authority for appellant Casel's argument that such a hearing must be held outside the presence of the jury. See United States v. Fragoso, 978 f.2d 896, 899 (5th Cir. 1992), cert. denied, 113 S.Ct. 1664 (1993).

5. Whether the court erred in conducted a James hearing in the presence of the jury?

Appellants argue that several comments by the prosecutor were improper and so infected the proceedings as to deprive the appellants of a fair trial. Appellants objected to all but one of these comments when made. Although at least one of prosecutor's comments was improper, we find that the error was

harmless.[6] Reversal based on improper argument by the prosecutor is not called for when there has not been a strong showing of a deleterious effect upon the right to a fair trial. See, e.g., United States v. Iredia, 866 F.2d 114, 117 (5th Cir. 1989), cert. denied, 492 U.S. 921 (1989); United States v. Lowenberg, 853 F.2d 295, 301 (5th Cir. 1988), cert. denied, 489 U.S. 1032; United States v. Diaz-Carreon, 915 F.2d 951, 956 (5th Cir. 1990); United States v. Young, 470 U.S. 1, 11 (1985).

If the defendant did not object to the prosecutor's comment when made, we review for plain error, that is, error

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[6] Even if a prosecutor's statement constitutes error, the error is harmless if examination of the entire record suggests that the defendant was not substantially prejudiced by the prosecutor's statement. United States v. Morris, 568 F.2d 396, 402 (5th Cir. 1978).

which is "obvious, substantial, and so basic and prejudicial that the resulting trial lacks the fundamental elements of justice." United States v. Valdiosera-Godinez, 932 F.2d 1093, 1097 (5th cir. 1991) (quoting United States v. Birdsell, 775 F.2d 645, 653 (5th Cir. 1985), cert. denied, 476 U.S. 1119 (1986)). However, if the defendant did object to the prosecutor's comments when made, there are three factors for the appeals court to consider in deciding whether to reverse the defendant's conviction due to improper prosecutorial argument. These factors are: (1) "the magnitude of the prejudicial effect" of the prosecutor's remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction. Diaz-Carreon, 915 F.2d at 956. If the evidence to

support a conviction is strong, then it is unlikely that the defendant was prejudiced by improper arguments of the prosecutor and reversal is not required. Id. The magnitude of the prejudicial effect is tested in part by looking at the prosecutor's remarks in context, and attempting to elucidate their intended effect. See, e.g., United States v. Bright, 630 F.2d 804, 825 (5th Cir. 1980); United States v. Forrest, 620 F.2d 446, 455 (5th Cir. 1980). Having laid out the applicable legal standard, we now review the allegedly improper prosecutorial arguments in turn.

First, appellant Johnson objected at trial that the prosecutor implied that appellant Johnson had failed to introduce evidence of his innocence; specifically, that the prosecutor asked rhetorically "why credit card receipts had not been

produced, and why testimony has not been given to support the defendant's claim of innocence." In fact, the prosecutor was only asking questions of a defense witness whose testimony was offered to support a particular defense asserted by defendant. The prosecutor asked the witness, "Why can't we see the cancelled check that [you] paid for [your] car repair with? How about the receipts, some credit card receipts?"[7] The record clearly shows that the prosecutor was merely commenting on the paucity of evidence for a particular defense that defendant Johnson sought to advance. Since the prosecutor's comments were intended as a statement that the defense had failed to produce any evidence

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[7] Ms. Mathis said she had traveled to Houston with Reed, and that no drugs were bought or sold on that trip. She also claimed that her car had required repair in Houston.

of a defense he was advancing, rather than a statement about the silence of the defendant himself, then the comments cannot form the basis for a reversal. See Bright, 630 F.2d at 825; United States v. Ramirez, 963 F.2d 693, 700 (5th Cir.), cert. denied, Garcia v. United States, 113 S.Ct. 388 (1992); United States v. Jones, 648 F.2d 215, 218 (5th Cir. Unit B 1981). In any case, Johnson did not show that he was prejudiced by the comments, and the evidence to support his conviction was strong.

Second, the appellants collectively object to the prosecutor's opening argument, in which she stated that conviction of the defendants was required to protect the jurors' community from drug dealers. Because appellants did not object to this portion of the prosecutor's argument at trial, appellants now must

establish that the court's allowance of the prosecutor's comments was plain error. Valdiosera-Godinez, 932 F.2d at 1097; Diaz-Carreon, 915 F.2d at 957. The prosecutor introduced her statements about the drug problems in Amarillo with prefatory phrases such as "You will see...."; "The evidence will show...."; "You will hear"; and "You will learn." The prosecutor's statement that illicit drug sales were common in certain sections of Amarillo was later corroborated by witnesses for both the prosecution and the defense. The government now argues that the prosecutor's opening remarks were nothing more than a "road map" to what she believed the evidence would show, while appellants contend the prosecutor's comments were calculated to prejudice the jury and "inflame their passions." In United States v. Morris, 568 F.2d 396, 401

(5th Cir. 1978), this court made it clear that a prosecutor may state her own opinion or knowledge of the case as long as she makes it clear that her conclusions are "the conclusions to be drawn from the evidence." In the instant case, the prosecutor presented evidence in support of her opening statements. In light of that crucial fact, we cannot say that the statements constitute plain error.

Third, in her closing argument, the prosecutor stated that she would not ask the jury to convict the defendants based solely on one witness' testimony, but that since she had presented nine witnesses against the defendants, she felt the jury "could feel pretty comfortable" about convicting the defendants. Appellants objected to this statement when made. The appellants claim that the prosecutor was suggesting to the jury that there was

something legally crucial about the fact that the government had produced nine witnesses, and that the prosecutor herself found these witnesses credible. We have often said that a prosecutor "may not express his personal opinion as to the credibility of witnesses, or his own belief regarding a defendant's guilt." United States v. Walker, 613 F.2d 1349, 1355 (5th Cir.), cert. denied, 446 U.S. 944 (1980). Here, however, it is clear from the context in which the statement was made that the prosecutor was not expressing her personal opinion about the defendants' guilt, the credibility of individual witnesses or of the witnesses as a group. Instead, she was offering a generalized comment on the weight of the government's case against the defendants. In other words, she was simply saying that the case against the defendants was not

thin. A prosecutor's assessment that the evidence for her case is strong is similar to her vouching for her witnesses by noting the absence of any evidence suggesting they have any reason to lie. Each is permissible to the extent that it draws a conclusion based solely on the evidence presented. See United States v. Enstam, 622 F.2d 857, 869 (5th Cir. 1980), cert. denied, 450 U.S. 912 (1981) (it is acceptable to draw reasonable inferences from the evidence when arguing to the jury; provided prosecutor does only this, she is not injecting "personal opinions" into her argument); Bright, 630 F.2d at 824 (a prosecutor may respond to character assassination visited upon the government's witnesses, and may point to the lack of any reason to think a witness is lying; "[t]he prosecutor is not obliged to sit quietly while character assaults

are made on his witnesses; he is entitled to argue fairly their credibility"); United States v. Binker, 795 F.2d 1218, 1223 (5th Cir. 1986) (prosecutor may respond to attacks on credibility of her witnesses), cert. denied, 479 U.S. 1085 (1987).

Fourth, in her closing argument, on of the prosecutors stated that while the government's star witnesses plea-bargained, they did not get sweet deals. She continued:

> I want you [the jury] to think about what these guys' lives are going to be like the rest of their life....Did you see James Dawkins [government witness] shaking up there when Seldon Hale [defense attorney] asked him, "What unit are you in, Mr. Dawkins?" Did you see him? He is scared....From now on, every Government witness in this case is going to have to watch his back....Do you remember Gilbert Salinas [government witness] telling us that Joe Cofer [defendant who is not appealing] told him, "It is not smart to be

> talking on people if you are going to the pen." And he told Gilbert Salinas that he could get him hit in the pen. He can get him from here, clear down to the pen. And folks, it can be done. You notice when one of the defense lawyers was questioning, I don't know who they were questioning, but they wanted to know, "What bay is Johnny Miller [government witness] in? What bay is Gilbert Salinas in? What bay is Homer Perkins in?" Well, why do they want to know, folks? <u>They want to get to them</u>. (emphasis added)

Appellants objected to the statement when it was made. They contend that the prosecutor's statement was prejudicial insofar as it implied that the defendants and their attorneys were threatening (or would threaten) physical harm to the government's witnesses. this does appear to be the clear import of the diatribe, and for that reason, we believe it was improper. However, we find that in light of the strong evidence against the

appellants, there was no substantial prejudicial effect.

CONCLUSION

The appellants' convictions and sentences are AFFIRMED. Appellants' claims of ineffective assistance of counsel are dismissed without prejudice to their being raised in a habeas corpus proceeding.